In the Supreme Court of the United States.

No. 564.

PETER WILSON,
Plaintiff in Error,

vs.

REPUBLIC IRON & STEEL COMPANY, and WARNER STINSON,
Defendants in Error.

STATEMENT OF THE CASE

The insufficiency and inaccuracy of the statement of the case by the plaintiff in error necessitates the following statement:

Plaintiff in error, hereinafter termed plaintiff, filed suit in the State Court against the defendant in error, Republic Iron & Steel Company, hereinafter termed the defendant, for injuries received while in defendant's employment. This suit was duly removed by the defendant, a foreign corporation, to the United States Court. Thereafter, in the United States Court, plaintiff took a voluntary non-suit. He then filed suit on the same cause of action in the State Court against the Republic Iron & Steel Company, joining as party defendant Warner Stinson, a resident of Alabama.

The alleged cause of action against the defendant, Republic Iron & Steel Company, was based in the Employer's Liability Act of Alabama on account of a negligent order of a superior employe of the defendant, Republic Iron & Steel Company. The alleged cause of action against defendant, Warner Stinson, was at common law, based on the giving of a negligent order by Warner Stinson.

Thereupon, defendant, Republic Iron & Steel Company, filed a petition for removal of the case to the United States Court, alleging a separable controversy and fraudulent joinder. The State Court granted the petition for removal. Thereupon, plaintiff made a motion in the United States Court to remand the case to the State Court. This motion was overruled in the United States Court.

Defendant, Republic Iron & Steel Company, made a motion in the United States Court to stay the prosecution of this latter case until the costs in the first case had been paid, praying that in default of payment of such costs within a reasonable time that the case be dismissed. This motion was granted by the court, the court ordering that the costs be paid on or before the first day of the next term of the court. These costs not being paid by such time, the court then made the following order: "It appeared to the court that the plaintiff herein did not pay costs by March 1, 1919, according to a former order made in this cause. It is therefore ordered by the court that this cause be and the same is hereby dismissed." (Transcript of record, page 12.)

No further proceedings were had in this cause until the suing out by the plaintiff of this writ of error. We find no warrant in the record for the statement by plaintiff in his brief "and for the sole reason that the complaint in the

opinion of the Federal Court alleged a separable controversy and failed to state a joint cause of action, the Federal Court overruled the motion to remand of the plantiff in error * * *" (See certificate of District Judge, page 16 of the transcript of record.)

ARGUMENT

A

There was no final judgment in this case to support a writ of error. It is fundamental that the writ of error may not be sued out in the absence of a final judgment.

McLish v. *Roff*, 141 U. S. 661, 35 Law. Ed. 893.

1. The overruling of the motion to remand is not reviewable by writ of error.

Bender v. *Pennsylvania Co.*, 148 U. S. 502, 37 Law Ed. 537.

2. The order of the District Court dismissing the case for failure of plaintiff to pay the costs in the former suit is not a final judgment. For convenience we here set out this order:

> "It appeared to the court that the plaintiff herein did not pay costs by March 1, 1919, according to a former order made in this cause. It is, therefore, ordered by the court that this cause be and the same is hereby dismissed." (Page 12 of record.)

On its face it is obvious that this is an order rather than a final judgment. No costs were taxed against plaintiff in this order. No execution could issue on this order.

The order was one issued by the court in the exercise of its discretion. The nature of such an order is discussed by this court in the case of *Henderson* v. *Griffin*, 5 Peters 151:

> "Rules of this kind are granted by courts to meet the justice and exigencies of cases as they occur; not depending solely on the interest which those who are subjected to such rules may have in the subject matter of suits which they bring and prosecute in the name of others but on a variety of circumstances which in the exercise of a sound discretion may furnish a proper ground for their interference."

It is clear that this is an order issued in the exercise of a proper discretion by the court in the matter of a rule of administration for the orderly procedure in the case. It was in no sense a decision on the merits. No writ of error may be properly sued out based on the issuing of a discretionary order by the trial court.

Mexican Central Railway Co., Ltd., v. *Pinkney*, 149 U. S. 194; 37 Law Ed. 699.

The order is clearly not reviewable here on the further ground that it is an order with reference to costs. It seemed proper to the court that the plaintiff should pay the costs in the former trial. This order was made, having reference solely to such payment of costs by the plaintiff. Such a matter is not the subject of review by writ of error.

Paper Bag Cases, 105 U. S. 766.

In that case judgment was given against one Nixon for one cent damages. From this judgment he appealed. The Court said:

"So far as the appeal of Thomas Nixon is concerned, the controversy is really as to costs alone. A decree against him will, consequently, not be considered."

It will be observed then that in that case the court, looking through the form to the substance, said that the whole controversy was really about costs only, and, accordingly, declined to review it. So here, this order had to do only with the payment of costs. It differs from the Paper Bag Cases only in that here the order did not even purport to be a final judgment, but on its face purported only to be an order or rule of court.

B

1. The case was properly removed. Plaintiff based his case upon injuries received while in the employment of the defendant, Republic Iron & Steel Company. He alleges a cause of action against defendant, Republic Iron & Steel Company under the Employer's Liability Act of Alabama on account of an alleged negligent order of a superior employe. He attempts to base the cause of action against Warner Stinson at common law by reason of the fact that Warner Stinson is alleged to have given him such an order.

Under the State decisions there can be no joint suit against an employer and employe where the cause of action against the employer is based upon the Employer's Liability Act and the cause of action against the employe is at common law.

Gulf States Steel Co. v. *Fail*, 78 So. 878 (Supreme Court of Alabama).

The state law will, of course, govern as to the right to

join where the State Supreme Court has held that no such joinder may be made. A joinder, as in this case, could only be made for the purpose of wrongfully defeating defendant's right of removal. The action of plaintiff in joining with defendant, Republic Iron & Steel Company, another defendant where no joint recovery could be had under the law would certainly afford the basis for an inference to be made by the District Court that the only purpose of such joinder was to defeat defendant's right of removal. Accordingly the action of the District Court in holding such joinder to be fraudulent should be upheld.

2. The petition for removal contains this allegation:

> "And this petitioner says that plaintiff at the time of the filing of his suit well knew and understood that the said Warner Stinson was not present and did not contribute positively to the infliction of any injuries on the plaintiff, and committed no positive act causing plaintiff to receive his said injuries, and that plaintiff well, and intimately and personally knew each and every person and individual who could by any possible chance have caused his injuries; and that possessing this knowledge he then well knew and yet knows that the said Warner Stinson was not and could not be in any degree whatsoever responsible to him personally for and on account of his injuries, but that he has fraudulently, improperly and illegally joined the said Warner Stinson with your petitioner as a sham defendant for the sole and only purpose of fraudulently, improperly and illegally defeating the removal of this case * * *." (Transcript Page 4.)

If these facts were true, it is clear that the joinder was fraudulent and that the court properly denied the motion to remand.

Wecker v. *National Enameling and Stamping Co.*,
204 U. S. 176; 51 Law Ed. 430.

It is further alleged in the petition that plaintiff tried his first case almost to a conclusion in the United States Court, when, being advised that he probably would not recover in that court because of the insufficiency of his cause of action, he took a non suit.

It affirmatively appears from the record that plaintiff's first suit on this same cause of action was removed to the United States District Court, the same court to which this writ of error is sued out. That he thereafter took a non-suit.

It is fundamental that every presumption will be given to the record in order to support the action of the District Court. Clearly from this record it is not only possible but probable that this case was tried the first time before the District Court; that it appeared from the evidence introduced before the District Court that Warner Stinson had nothing to do with plaintiff's injuries. If such a state of facts did exist, and we submit that under this record they must be presumed to have existed, then the District Judge judicially knows from the proceedings of the record in his court that Warner Stinson had nothing to do with the case.

It is quite consistent with the record that he knew this from plaintiff's own lips in the proceedings in open court in the trial of the first case. Knowing this, he properly overruled the motion to remand in the absence of the introduction of evidence by either side on this motion.

Respectfully submitted,
AUGUSTUS BENNERS,
Attorney for Defendants in Error.